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IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-414

JOHN C. ANGGELIS
*Petitioner.*

v.

UNITED STATES OF AMERICA
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

---

Petitioner John C. Anggelis seeks a writ of certiorari to the United States Court of Claims.

## OPINION BELOW

The United States Court of Claims rendered a decision on June 15, 1973, which has neither been officially or unofficially reported (App. A, *infra*, p. 1a).

## JURISDICTION

The decision of the United States Court of Claims under review was entered on June 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255.

## QUESTION PRESENTED

1. Whether the United States Court of Claims has jurisdiction to grant relief to a party who claims that the Secretary of the Army and the military authorities acted arbitrarily and capriciously, and abused their discretion, in arriving at the amount of an award under the Military Claims Act, 10 U.S.C. § 2733.

## STATUTES AND RULES INVOLVED

The statutes and rules involved are 10 U.S.C. § 2733 (Military Claims Act); 28 U.S.C. § 1491; 28 U.S.C. § 1346 (b); 28 U.S.C. § 2680 (k); Section 1255 of the Judicial Code, 28 U.S.C. § 1255, all of which are set forth in pertinent part as Appendix B to this Petition.

## STATEMENT

This case presents an important question as to the jurisdiction of the United States Court of Claims.

Petitioner on November 15, 1972, filed a petition in the Court of Claims seeking a monetary judgment against the United States, and alleging that the Secretary of the Army had abused his discretion and had acted arbitrarily and capriciously in establishing the amount of relief to which petitioner was entitled as a result of claims he had filed under the Military Claims Act. A copy of said petition is attached hereto as Appendix C. The Court of Claims by order dated June 15, 1973, granted defendant's motion to dismiss the petition on the ground that "plaintiff's alleged claim sounds

in tort and is therefore not within the jurisdiction of this Court." The Court of Claims at no time made any ruling with respect to the merits of petitioner's claims. It simply held in effect that the claims sounded in tort and therefore were not within its jurisdiction, citing 28 U.S.C. § 1491 and 28 U.S.C. § 1346 (b).

Petitioner seeks certiorari in this case pursuant to 28 U.S.C. § 1255.

## REASONS FOR GRANTING THE WRIT

The United States Court of Claims has on innumerable occasions made itself available to grant relief to a party aggrieved by the action of an executive or administrative officer which is arbitrary and capricious. *Carlin v. United States*, 100 F. Supp. 451, 121 Ct. Cl. 643 (1951), *cert. denied*- 342 U.S. 856. Such jurisdiction is clearly supported by 28 U.S.C. § 1491 which states:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any Act of Congress, or any regulation of an executive department, . . . ."

However, Section 1491 specifically denies to the Court of Claims jurisdiction of cases "sounding in tort". Furthermore, 28 U.S.C. § 1346 (b) clearly gives the United States District Courts exclusive jurisdiction of tort claims against the United States. It is these two latter provisions denying jurisdiction to the Court of Claims of cases sounding in tort upon which the Court of Claims relied in dismissing petitioner's petition.

Petitioner submits that the Court of Claims has erred on an important question as to its own jurisdiction, and that if this error is allowed to stand, the military authorities would be im-

munized from review by the Court of Claims of any arbitrary and capricious actions on their part in administrating monetary claims against the United States under the Military Claims Act. Thus, it is essential to distinguish an action which directly seeks damages resulting from a tort, and an action, such as petitioner's in this case, seeking judicial review of an award which has been made by military authorities under an Act of Congress specifically authorizing monetary awards for damages caused by employees of the military departments.

Petitioner readily agrees that this Court lacks jurisdiction of any claim sounding in tort. [1] However, it is clear from the face of petitioner's petition in the Court of Claims that jurisdiction is vested in that Court primarily on the basis of that section of the Tucker Act, 28 U.S.C. § 1491 which states that the "Court of Claims shall have jurisdiction to render judgment upon *any claim* against the United States founded either upon the Constitution, *or any Act of Congress, or any regulation of an executive department* . . . ." [Emphasis supplied] Petitioner's claim is clearly based on 10 U.S.C. § 2733, known as the Military Claims Act, and the regulations promulgated by the Department of the Army thereunder. There is no issue whatsoever in this case concerning tort liability, but only as to the amount to which petitioner is entitled under the terms of the Act. The liability of the Government rests solely on the application of an Act of Congress, and the genesis of petitioner's petition in the Court of Claims is that the Army authorities failed to properly follow their own regulations, and that the Secretary of the Army was arbitrary

---

[1] Petitioner was unable to bring suit in a Federal District Court under the Federal Tort Claims Act because the accident for which the claims were made occurred overseas, therefore falling within the foreign territory exception of the Act. 28 U.S.C. 2680(k).

and capricious in exercising authority under the Military Claims Act and the implementing regulations. The Court of Claims has awarded monies under disability statutes, and other acts of Congress which provide benefits to persons described in such acts, in a myriad of cases where the Court has found that the administration of the statutes and regulations was performed in an arbitrary and capricious manner on the part of the administrative authorities. E.g. *Hutter v. United States*, 345 F. 2d 828, 170 Ct. Cl. 517 (1965), where the Court of Claims reviewed the action of the Air Force Board for Correction of Military Records denying an application for disability retirement rating, in order to determine whether the Secretary's decision was arbitrary and capricious, unsupported by evidence or contrary to the laws and regulations relating to disability retirement. In other words petitioner herein was not simply suing the Government for damages arising from a tort, as would have been the case if there were no statute covering injuries of the kind described in the petition, but was seeking to enforce his right to a proper administration of his claim under the Military Claims Act, which Act specifically allows payment for injuries such as incurred by the persons represented by petitioner.

In *Eastport Steamship Corporation v. United States*, 372 F. 2d 1002, 1007 (1967) the Court of Claims clearly enunciated its jurisdiction in cases such as the instant one:

> "Section 1491 of Title 28 of United States Code allows the Court of Claims to entertain claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort'. But it is not every claim involving or invoking the Constitution, a federal

statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes—those in which plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; *and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury.*—In the second group, where no such payment has been made, *the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum.*" [Citing cases] [Emphasis supplied]

The Court in *Eastport, supra,* then describes several litigations falling into the second category, including eminent domain, disability retired pay claims, back pay claims occasioned by wrongful dismissals from the Civil Service, and claims for compensation for flood damage authorized by statute.

Clearly in the instant case petitioner's claim does not arise from a general principle of tort law, but seeks specific compensation as provided for by the Military Claims Act. Fortunately, petitioner here does not seek nor need he seek to establish tort liability, since he is clearly entitled to recover monies under the terms of the Military Claims Act, and thus the jurisdictional requirements set forth in Section 1491 are clearly met.

The Court of Claims in *Ralston Steel Corporation v. United States,* 340 F. 2d 663 (1965) again adhered to the jurisdictional principles stated above, as follows:

"In general, a claimant who says that he is entitled to money from the United States because a

> statute or a regulation grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable. Where an Act of Congress—or an executive regulation—arguably confers such rights upon the claimant, the court will assume jurisdiction and decide his case on the merits, even though the defendant may ultimately prevail." (pp. 667, 668).

In the instant case, petitioner certainly had an arguable right to claim monetary relief under the explicit terms of the Military Claims Act. Furthermore, any question as to the merits of petitioner's claims must not be confused with the question of *jurisdiction* of this court to make a determination on such merits. As stated in *Ralston Steel, supra,*

> "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact they must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." [Citing cases] (p. 667).

The mere fact that the original act which caused petitioner to come within the terms of the Military Claims Act was in the nature of a tort cannot provide a basis for claiming that petitioner's claim is one "sounding in tort". Petitioner's petition in the Court of Claims was based solely on the Military Claims Act, which is an Act of Congress specifically providing for money damages in cases such as the instant one. Therefore, the petition on its face clearly sets forth a cause of action within the jurisdiction of the Court of Claims under 28 U.S.C. § 1491.

## CONCLUSION

For the reasons set forth above this petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel for Petitioner, John C. Anggelis*

## APPENDIX A

## IN THE UNITED STATES COURT OF CLAIMS

**No. 424-72**

JOHN C. ANGGELIS

v.

THE UNITED STATES

---

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

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### ORDER

This case comes before the court on defendant's motion, filed January 15, 1973, to dismiss the petition. Upon consideration thereof, together with the opposition thereto, without oral argument, it is concluded that plaintiff's alleged claim sounds in tort and is therefore not within the jurisdiction of this court. See 28 U.S.C. § 1491 and 28 U.S.C. § 1346 (b).

IT IS THEREFORE ORDERED that defendant's said motion to dismiss be and the same is granted and the petition is dismissed.

BY THE COURT

Chief Judge

June 15, 1973

# APPENDIX B

*10 U.S.C. § 2733* (Military Claims Act):

**§ 2733. Property loss; personal injury or death; incident to noncombat activities of Department of Army, Navy, or Air Force**

(a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the chief legal officer of the Coast Guard, as appropriate, if designated by him, may settle and pay in an amount not more than $15,000, a claim against the United States for—

(1) damage to or loss of real property, including damage or loss incident to use and occupancy;

(2) damage to or loss of personal property, including property bailed to the United States and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be; or

(3) personal injury or death;

either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

(b) A claim may be allowed under subsection (a) only if—

* * * * * * * * * *

(4) the damage to, or loss of, property, or the personal injury or death, was not caused wholly or partly by a negligent or wrongful act of the claimant, his agent, or his employee; or, if so caused, allowed only to the extent that the law of the place where the act or omission complained of occurred would permit recovery from a private individual under like circumstances; and

* * * * * * * * * *

(d) If the Secretary concerned considers that a claim in excess of $15,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $15,000 and report the excess to Congress for its consideration.

* * * * * * * * * *

(f) For the purposes of this section, a member of the Environmental Science Services Administration or of the Public Health Service who is serving with the Navy or Marine Corps shall be treated as if he were a member of that armed force.

(g) In any case where the amount to be paid is not more than $2,500, the authority contained in subsection (a) may be delegated to any officer of an armed force under the jurisdiction of the Department concerned, subject to appeal to the Secretary concerned, or his designee for that purpose.

(h) Under such regulations as the Secretary of Defense may prescribe, he or his designee has the same authority as the Secretary of a military department under this section with respect to the settlement of claims based on damage, loss, personal injury, or death caused by a civilian officer or employee of the Department of Defense acting within the scope of his employment or otherwise incident to noncombat activities of that department.

As amended Nov. 2, 1966, Pub.L. 89—718, § 8(a), 80 Stat. 1117; Sept. 26, 1968, Pub.L. 90—522, 82 Stat. 875; Sept. 26, 1968, Pub.L. 90—525, §§ 1, 3—5, 82 Stat. 877, 878; July 8, 1970, Pub.L. 91—312, § 2, 84 Stat. 412.

*28 U.S.C. § 1255:*

**Court of Claims; certiorari; certified questions.**

Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant;

(2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question. June 25, 1948, c. 646, 62 Stat. 928.

*28 U.S.C. § 1346:*

**United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * * * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or em-

ployment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * * * * * * *

*28 U.S.C. § 1491:*

**Claims against United States generally; actions involving Tennessee Valley Authority.**

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

* * * * * * * * * * *

*28 U.S.C. § 2680 (k):*

**Exceptions**

**The provisions of this chapter and section 1346(b) of this title shall not apply to—**

* * * * * * * * * *

**(k) Any claim arising in a foreign country.**

* * * * * * * * * *

**APPENDIX C**

**IN THE**
**UNITED STATES COURT OF CLAIMS**

---

**No. 424-72**

---

**JOHN C. ANGGELIS,**
***Plaintiff.***

**v.**

**THE UNITED STATES OF AMERICA,**
***Defendant.***

---

**PETITION**

---

**(Filed Nov 15, 1972)**

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**TO THE HONORABLE UNITED STATES COURT OF CLAIMS:**

**The plaintiff respectfully alleges as follows:**

**1. Plaintiff is an adult citizen of the United States and a resident of the State of Kentucky, and he brings this action in his capacity as the Executor of the estates of Richard J. Amick**

and Donna J. Amick, deceased; as Administrator of the estates of David R. Amick and Darryl E. Amick, deceased; and as Guardian of Douglas Amick, a minor. Plaintiff's claim is founded on an Act of Congress, 10 U.S.C. §2733, and regulations of the Department of the Army prescribed thereunder, and jurisdiction is vested in this Court pursuant to the provisions of 5 U.S.C. §§ 702, 704 and 706 and 28 U.S.C. §1491.

2. 10 U.S.C. §2733 (hereinafter referred to as the Military Claims Act) provides in pertinent part:

> "(a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the chief legal officer of the Coast Guard, as appropriate, if designated by him, may settle and pay in an amount not more than $15,000, a claim against the United States for
>
> * * * *
>
> " (3) personal injury or death; either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to non-combat activities of that department or the Coast Guard.
>
> * * * *
>
> " (d) If the Secretary concerned considers that a claim in excess of $15,000 is meritorious and would otherwise be covered by this section, he may pay the claimant

$15,000 and report the excess to Congress for its consideration."

3. The Department of the Army has passed regulations implementing 10 U.S.C. §2733 (Military Claims Act), of which the following are pertinent:

*AR 27-20 §2-16. Determination of Quantum*—Principles relating to the computation of damages generally are set forth in paragraphs 2-17 through 2-19, and are intended for general guidance only. Ordinarily, the law of the place where the incident occurred will be applied in determining awards for personal injury or death, or loss, damage, or destruction of property, with the following exceptions:

* * * *

"(b) If the claim arises in a foreign country and is cognizable and payable under the Military Claims Act (10 U.S.C. §2733) *the law of the state of legal residence of the person whose personal injury, death or property damage generated the claim generally will be applied.*" (Emphasis supplied)

*AR 27-21 § 11 (c)*—In determining quantum and elements of damages, paragraphs 15 and 16, AR 27-20, will be applied. Where there is no applicable rule established in AR 27-20, the law of the place where the act or omission occurred normally will be applied, except that in claims arising in foreign countries, *the law of the state of legal residence of the person whose injury, property damage, or death generated the claim may be applied.* (Emphasis supplied)

*AR 27-21 §5 Claims Not Payable*—A claim is not allowable under this regulation which

* * * *

"(c) Falls under

(2) The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424 33 U.S.C. 901) or other workmen's compensation laws or regulations, including local law or custom, in cases where contribution is made or insurance premiums paid directly or indirectly by the United States on behalf of the injured employee. *If, in the opinion of an approving or settlement authority, the claim should be considered payable,* e.g., *the injuries do not result from a normal risk of employment or adequate compensation is not payable under workmen's compensation laws, the file will be forwarded with recommendations through claims channels to the Chief, U.S. Army Claims Service, who may authorize payment of an appropriate award. The Chief, U.S. Army Claims Service, also may specify that all or any part of any compensation received by the claimant from workmen's compensation sources as above will be deducted from the award to claimant.* The claim of an insurance carrier subrogee who has received premiums paid directly or indirectly by the United States on behalf of the

> injured employee, however, is not allowable." (Emphasis supplied)

AR 27-20 ¶ 2-15(2)...

> "In any event, the rule in the *Brooks* case (*U.S. v. Brooks*, 176 F.2d 482 (4th Cir. 1949)) requiring setoff of amounts obtained through military or veteran's compensation systems against amounts otherwise recoverable will be followed."

4. On June 13, 1969, Dr. Richard J. Amick was employed by the University of Kentucky, and was on special assignment in Thailand as an agricultural economist under a contract between the University of Kentucky and the United States Government (Agency for International Development) when he and his family, consisting of his wife, Donna J. Amick, and their children, David R. Amick, Darryl E. Amick and Douglas Amick, all minors, were passengers in an International station wagon which was struck head-on by a U.S. Army 5-ton truck on Highway #2, near Bangkok, Thailand, which had illegally pulled out of its lane. As a result, the station wagon left the highway, overturned and exploded into flames. The driver of the vehicle, and Richard J. Amick, Donna J. Amick, David R. Amick and Darryl E. Amick were burned beyond recognition and killed instantly, and Douglas Amick was severely injured. The investigation of the accident showed that it was caused solely by the driver's negligent and unlawful operation of the U.S. Army truck, and the negligent maintenance of the truck by Army personnel.

5. In July 1969, plaintiff was appointed by the County Court of Fayette County, Kentucky as the Executor of the estates of Richard J. Amick and Donna J. Amick, and as Administrator of the estates of David R. Amick and Darryl E. Amick, and as Guardian of Douglas Amick.

6. On April 1, 1970, plaintiff duly filed claims under the Military Claims Act with the U.S. Army Claims Service, Foreign Claims Division in the following amounts: Donna J. Amick—$100,000; Richard J. Amick—$800,000; David Amick—$300,000; Darryl Amick—$300,000; Douglas Amick—$25,000. At no time subsequent to the filing of the said claims has defendant disputed the Government's liability under the Military Claims Act for the deaths and personal injuries incurred as a result of the accident. However, after a protracted period of time, the Assistant Secretary of the Army (Financial Management) on August 21, 1972 disapproved the claim made by plaintiff on behalf of Richard J. Amick, and approved the following sums for the remaining claims: Estate of Donna J. Amick $60,000; estate of David R. Amick—$30,000; estate of Darryl E. Amick—$30,000; and Douglas E. Amick—$5,000, provided these amounts were accepted by plaintiff "in full and final settlement of all claims arising out of the incident." This action by the Undersecretary of the Army was the final action of the U.S. Army with regard to plaintiff's claims.

7. Plaintiff on November 6, 1972, rejected the aforementioned awards, and has exhausted all administrative remedies.

8. The Undersecretary of the Army's decision as set forth above was an abuse of discretion, contrary to law, and was arbitrary and capricious, in that (1) the amounts awarded are unreasonably low; (2) he failed to follow the Department of the Army's regulations with respect to the claim on behalf of Richard J. Amick, deceased; and (3) failed to follow said regulations with respect to the quantum of damages for the other decedents, all of which is more particularly set forth below:

9. At the time of his death, Richard J. Amick was earning

approximately $24,000 a year in his capacity as Professor of Agricultural Economics at the University of Kentucky, and was 36 years of age. As a result of his death, his estate became entitled to death benefits under the Longshoremen's and Harbor Workers' Compensation Act, the premiums for which had been paid by the U.S. Government. Said benefits amount to $73.50 every two weeks, and payments will continue until his sole surviving son, Douglas J. Amick, (who at the time of the accident was 13 years of age) becomes 21. Thus, the maximum total amount of said payments would be $15,288 over an eight year period. The Undersecretary of the Army failed to reasonably exercise his discretion when he denied any recovery to the estate of Dr. Amick, since he was clearly authorized under AR 27-21 §5 to deduct *in toto* the sums which would be received by Douglas Amick under the Longshoremen's Act which would accrue to him until he was 21. Furthermore, the Undersecretary failed to follow the rule in the *Brooks* case, as required by AR 27-20, which rule requires that such sums be deducted, but does not authorize a total denial of a claim because of the existence of such benefits.

10. AR 27-21 §5 is unlawful and contrary to the intent and meaning of the Military Claims Act, and is inconsistent with the rule and the law set forth in the *Brooks* case as referred to and adopted in AR 27-20, insofar as it authorizes the Army to disallow a claim for wrongful death altogether, rather than merely deduct the amount of benefits under the Longshoremen's Act from the recovery which would otherwise be obtained. In any event, the total denial of any award to Dr. Amick's estate, for whatever reason, was arbitrary and capricious and an abuse of discretion on the part of the Undersecretary of the Army.

11. All of the decedents were residents of the State of Ken-

tucky at the time of their death, and the aforesaid regulations clearly provide that the state of the domicile of the claimants should determine the proper method for assessing damages. Section 241 of the Kentucky Constitution and §411.130 of the Kentucky Revised Statutes permit the personal representative of the decedent to prosecute an action to recover damages for a wrongful death resulting from the negligence or the wrongful act of another. Damages under these provisions have consistently been held to be the destruction of the deceased's power to earn money and not the destruction of the decedent's income from the particular work in which he was engaged at the time of death. Therefore, the Kentucky death statute must be distinguished from several state wrongful death statutes under which damages are assessed consistent with the *actual* income earned by the decedent, instead of the *potential* income. This same principle under Kentucky law applies when the decedent is a minor, and the measure of damages for the death of a young child in Kentucky is the fair compensation to the estate of the child for the destruction of his potential capacity to earn money as an adult. Damages for the death of a housewife under Kentucky law are measured by the value of her services.

12. According to the HEW Public Health Service Vital Statistics of the United States Tables, the remaining life expectancy of the four decedents at the time of their death was as follows: Richard Amick (age 36) 35.3 years; Donna Amick (age 36) 41.3 years; David Amick (age 11) 58.6 years; Darryl Amick (age 7) 62.5 years. If Kentucky law were to be literally applied, the damages for these claimants could be assessed as follows: Richard Amick—$847,200; David Amick—$486,000; Darryl Amick—$485,000; Donna Amick-$206,500. The said figures assume that the children would not work during their minority, but that their overall annual earning capacity for the remainder of their lives would

be at least $10,000. and that the value of Donna Amick's services as a housewife, which is the proper test for damages under Kentucky law, was at least $5,000 a year.

13. Plaintiff in the course of negotiations with the U.S. Army Claims Service submitted a final demand for the purpose of settlement in the sum of $500,000 as total compensation for all of the claims. This sum was considerably less than the amount that the claims would be worth if Kentucky law were literally applied, as aforesaid.

14. Nevertheless, the Undersecretary of the Army has totally denied any sum on behalf of the estate of the chief wage earner in the family, Dr. Richard J. Amick, and arbitrarily and unlawfully failed to follow the Army's own regulations in assessing the damages for the estates of the remaining deceased. As a result, the total award of $125,000 as compensation for four deaths and personal injuries to the sole survivor does not meet the test of substantial fairness, in that it is unreasonably low, and constitutes an abuse of the discretion which is afforded the Secretary of the Army under the Military Claims Act and the regulations passed thereunder. Even if the Undersecretary had precisely followed the Army's own regulations. the resulting award, viewed in its entirety, constitutes an overreaching leap into the arbitrary and inequitable.

15. Plaintiff in his representative capacity is entitled to at least the sum of $500,000 as compensation for the deaths of the aforesaid deceased, which sum it would have accepted if awarded by the Secretary of the Army. However, plaintiff is not bound by his willingness to accept said sum, and by all standards set forth by Kentucky law, and under the guidelines set forth in the Army's regulations governing quantum of damages under the Military Claims Act, plaintiff is entitled to considerably more than $500,000.

**WHEREFORE**, the plaintiff prays that the Court enter judgment in his favor in such amount that should have been awarded if the Secretary of the Army had properly exercised his discretion, but not less than $500,000.

**Respectfully submitted,**

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LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 30 1973

No. 73-414

# In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN C. ANGGELIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-414

JOHN C. ANGGELIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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In 1969, Richard J. Amick, his wife and two children, were killed in Thailand, and a third child was injured, as a result of a collision between an automobile in which they were riding and a United States Army truck. Petitioner, the representative of the Amick estates, and guardian of the minor child, filed claims under the Military Claims Act, 10 U.S.C. 2731 *et seq.* The Secretary of the Army disallowed the claim on behalf of Richard J. Amick, but approved awards on the other claims, totalling $125,000.

Petitioner declined to accept the settlement and filed a petition in the Court of Claims to review the Secretary's settlement determination (Pet. App. C1-C10). The Court of Claims dismissed the petition on the ground that "plaintiff's alleged claim sounds in tort and is therefore not within the jurisdiction of this court" (Pet. App. 1a).

The Court of Claims correctly so held. In addition, the court lacked jurisdiction since the administrative determination of a claim under the Military Claims Act is "final and conclusive." 10 U.S.C. 2735.

1. The jurisdiction of the Court of Claims is founded upon the Tucker Act, 28 U.S.C. 1491, which waives the government's immunity from suit in five categories of cases—claims founded upon (1) the Constitution, (2) Acts of Congress, (3) regulations of an executive department, (4) express or implied contracts with the United States, and (5) claims "for liquidated or unliquidated damages in *cases not sounding in tort.*" (emphasis added). Thus, Congress specifically excluded tort claims from the jurisdiction of the Court of Claims.

The Court of Claims correctly held that petitioner's claim "sounds in tort" within the meaning of the Tucker Act exclusion, since it would be tort-grounded between private parties. *Eastport Steamship Corp.* v. *United States,* 372 F. 2d 1002, 1013 (Ct. Cl.) the gravamen of petitioner's claim is for personal injuries and wrongful death caused by the alleged negligence of the driver of another vehicle.[1]

Petitioner attempts to avoid the specific tort exclusion in the Tucker Act by alleging that his suit does not seek damages for a tort but rather asserts a claim founded upon the Military Claims Act and implementing Army regulations (Pet. 4-7). Under petitioner's theory, any

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[1] As a tort claim against the United States petitioner's claim would be cognizable under the Federal Tort Claims Act, but for 28 U.S.C. 2680(k) which specifically excludes from the coverage of the Federal Tort Claims Act "[a]ny claim arising in a foreign country."

tort committed by government agents could be said to violate some statutory duty and a claim for resulting damages could thus be said to be founded upon a statute—contrary to the intention of Congress to exclude tort claims from the coverage of the Tucker Act. To determine whether a claim "sounds in tort" for purposes of the Tucker Act exclusion, the substance of the claim must be controlling. See *King* v. *United States*, 390 F. 2d 894, 909 (Ct. Cl.), reversed on other grounds, 395 U.S. 1; cf. *Bigby* v. *United States*, 188 U.S. 400, 409.[2]

2. In the Military Claims Act, 10 U.S.C. 2731 *et seq.*, Congress provided an administrative remedy for claims for property damage, personal injury or death, caused by personnel of the armed forces acting within the scope of their employment. The Act empowers the Secretary of the military service to exercise his discretion in determining both the merits of the claim and the proper compensation up to $15,000 (10 U.S.C. 2733(a)), and provides that any excess over this amount may be reported by the Secretary to Congress for its consideration (10 U.S.C. 2733(d)). Furthermore, the Act provides that the administrative "settlement of a claim" thereunder "is final and conclusive" (10 U.S.C. 2735) and the term "settle" is defined broadly to mean "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance" (10 U.S.C. 2731).

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[2] The Court of Claims cases petitioner cites, *Eastport Steamship Corp.* v. *United States*, *supra*, *Hutter* v. *United States*, 345 F. 2d 828, *Ralston Steel Corp.* v. *United States*, 340 F. 2d 663, and *Carlin* v. *United States*, 100 F. Supp. 451, are inapposite. None of those cases involved a claim which, like the instant one, is essentially grounded upon tortious conduct.

Thus, the express language of the Military Claims Act manifests a congressional intention to provide an exclusive administrative remedy for covered claims, subject only to congressional consideration of claims in excess of $15,000. The express declaration that "[n]otwithstanding any other provision of law" the administrative determination "is final and conclusive" unmistakably establishes that Congress did not authorize any court to review that determination.

The exclusion of Court of Claims jurisdiction to review administrative settlements of claims is confirmed by the discretionary character of the administrative determination. See *Williamsport Wire Co.* v. *United States*, 277 U.S. 551, 557; *Dismuke* v. *United States*, 297 U.S. 167, 172. In *United States* v. *Babcock*, 250 U.S. 328, the court considered a similar finality provision of an earlier administrative claims statute and held that it precluded the Court of Claims from reviewing the claim. The Court said that "the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts" and that "where a statute creates a right and provides a special remedy, that remedy is exclusive." 250 U.S. at 331.[3]

[3] The petition filed in the Court of Claims alleged that the Secretary's settlement determination (totalling $125,000) was "unreasonably low" and requested the Court to enter judgment for an amount not less than $500,000 (Pet. App. C9-C10). But the Military Claims Act provides that the Secretary can award only $15,000, although it grants him discretion to report the excess of $15,000 to Congress for its consideration (10 U.S.C. 2733(d)). The Act therefore necessarily limits any possible Court of Claims judgment in this case to directing the Secretary to make a more favorable recommendation to Congress. Such a remedy, however, is outside the jurisdiction of the Court of Claims, since it has no power to grant relief not in the form of a money judgment. *United States* v. *King*, 395 U.S. 1, *United States* v. *Jones*, 131 U.S. 1.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

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